Supreme Court, U.S.
FILED
SEP 3 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-500

In the

Supreme Court of the United States.

October Term, 1985

EDWARD G. CARROLL and
JOHN E. BARCLAY
Petitioners

v.

WILLIAM E. ALBERTS and
DONALD T. DEVINE
Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PAUL R. DEVIN
DEBORAH S. GRIFFIN
RIPLEY E. HASTINGS
PEABODY & ARNOLD
One Beacon Street
Boston, MA 02108
(617) 523-2100

FLORENCE E. FREEMAN
FREEMAN & WHITE
483 Boston Post Road
Weston, MA 02193
(617) 893-1510

TILLMA ASSOCIATES, LEGAL PRINTERS, BOSTON.

QUESTIONS PRESENTED

1. Whether the First and Fourteenth Amendments of the United States Constitution prohibit the secular state court from adjudicating a dispute between a minister of the United Methodist Church and his immediate superiors within the Church, in a suit for inducing breach of confidentiality between the minister and his psychiatrist, resolution of which turns, under state common law, upon (a) the reasonableness of the superiors' belief that Church law not only permitted but required them to make inquiry about the minister's mental health; (b) express or implied consent by the minister to such inquiry by virtue of his status as a clergyman and his consequent submission to Church law; and (c) proof of damages caused by such breach, including damages claimed because of the minister having been placed in involuntary retirement by the Annual Conference of the Church.

2. Whether the First and Fourteenth Amendments of the United States Constitution prohibit the secular state court from inquiring, either in the above-described dispute between a minister and his superiors within the Church or in the underlying suit against his psychiatrist for breach of confidentiality, into the alleged causal connection between the claimed breach of confidentiality and the decision of the 1973 Annual Conference of the Southern New England Conference of the United Methodist Church, whose members, several hundred clergymen, voted to place the minister-plaintiff in involuntary retirement.

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The opinion of which review is sought is *Alberts* v. *Devine,* 395 Mass. 59, ____ N.E.2d ____ (1985).

STATEMENT OF JURISDICTIONAL GROUNDS

On June 4, 1985, on appeal and on reported questions, the Massachusetts Supreme Judicial Court entered the Order (Appendix A) and opinion (Appendix B) of which review is sought. Jurisdiction of this Court is based upon 28 U.S.C. §1257(3). The rights, privileges and immunities of the Petitioners under the First and Fourteenth Amendments of the United States Constitution were claimed and set up in the proceedings in the Superior Court of the Commonwealth of Massachusetts, the trial court below. No rehearing was sought from the Supreme Judicial Court.

The Supreme Judicial Court's decision has finally determined the federal issues in this case and is ripe for review in this Court under 28 U.S.C. §1257(3). The highest court in the Commonwealth of Massachusetts has clearly rejected the Petitioners' federal constitutional defenses by reversing the grant of summary judgment entered by the trial court in favor of the Petitioners and by vacating the protective order entered by the trial court on constitutional grounds. These defenses and claims are now foreclosed in any further proceedings in the Superior Court. Upon remand and trial, regardless the outcome, the Petitioners and their Church will be subject to precisely that civil inquiry from which they have claimed protection under the First and Fourteenth Amendments. Once a trial is had, it will be too late effectively to review the present order and Petitioners' constitutional rights will have been lost irreparably. *See Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 482 n. 10 (1975), *citing Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546 (1949). No possible developments upon

remand, short of settlement, could eliminate or minimize this risk of constitutional harm. Since further proceedings cannot remove or otherwise affect this threshold federal issue, and since this federal issue cannot be raised at any subsequent time in the state courts, the Supreme Judicial Court's decision is final for purposes of review in this Court. *See, Cox, supra* at 476-486; *accord, New York* v. *Quarles,* ____ U.S. ____, 81 L. Ed. 2d 550, 554 n. 1, 104 S. Ct. ____ (1984). *Cf. New York* v. *Cathedral Academy,* 434 U.S. 125, 128 n. 4 (1977) (where further proceedings cannot affect threshold federal issue, appellate decision is final for purposes of review by this Court).

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

FOURTEENTH AMENDMENT §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners, Bishop Edward G. Carroll and Rev. John E. Barclay, and Respondent Rev. William E. Alberts at all relevant times were ordained ministers of the United Methodist Church ("the Church"). In 1972, Rev. Alberts was pastor at Old West Church in Boston, Massachusetts, which was within the District of which Rev. Barclay was Superintendent and within the Southern New England Conference of which Bishop Carroll was Bishop. Bishop Carroll and Rev. Barclay thus were Rev. Alberts' immediate superiors within the Church.

Church law is set forth in the Book of Discipline and defines the duties and relationships among members of the ordained clergy. It provides that each minister is bound to accept whatever appointment is made for him by his Bishop on an annual basis. The Book of Discipline charges a Bishop with assessing annually, in consultation with the minister's District Superintendent, the emotional and mental condition of the minister as well as other criteria affecting his ability to perform the ministerial duties of any particular appointment. Ultimately, a minister's eligibility for appointment is determined, under Church law, by the Annual Conference for each region within the Church, although it is the Bishop who selects the particular appointment. The persons entitled to vote at the Annual Conference on eligibility for appointment (or other "relation" such as retirement) are the ordained clergy within the Conference.

The Book of Discipline also defines the responsibilities of a District Superintendent to include counselling and service as pastor to the clergy within his District.

In early spring, 1973, Bishop Carroll and Rev. Barclay became concerned about Rev. Alberts' condition. He had been treating with a psychiatrist, Dr. Donald T. Devine, for many years but had terminated that relationship rather

stormily in November, 1972. He had taken a leave of absence from his church in January, 1973. In March, 1973, he performed a marriage ceremony for two homosexual men against the wishes of Bishop Carroll. It was undecided to what post, if any, he should be appointed at the Annual Conference in June, 1973.

Against that background, on April 9, 1973, Bishop Carroll and Rev. Barclay met with Dr. Devine to talk about Rev. Alberts. As indicated in the record, both Bishop Carroll and Rev. Barclay were interested in helping Rev. Alberts, in counselling him, in addressing the issue of annual appointment or further leave of absence in a way beneficial to his mental health, in short, in carrying out their pastoral and administrative duties as his superiors.

Precisely what was said among Dr. Devine, Bishop Carroll and Rev. Barclay is in dispute. Rev. Alberts has alleged that whatever was said amounted to a breach of confidentiality by Dr. Devine wrongfully induced by Bishop Carroll and Rev. Barclay.

Following that meeting, Rev. Alberts' mental condition and his performing the gay marriage were matters of discussion in meetings of various subcommittees of the Church concerned with appointments, including the Board of Ministry. After Bishop Carroll raised these issues with Rev. Alberts, Rev. Alberts drew them to the attention of the press. Various proposals were made by the Church to Alberts regarding his status for the year 1973-74, but no agreement was reached. Finally, at the June, 1973, Annual Conference, Bishop Carroll and the Board of Ministry recommended that Rev. Alberts be placed in the retired relation[1] for the 1973-74 year. After extensive discussion, including a lengthy statement by Rev. Alberts himself, the over three hundred clergy members of the Annual Conference so voted.

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[1]Retirement is a recognized relation within the Church. It does not amount to expulsion or loss of status as an ordained minister.

The Book of Discipline establishes a tribunal within the Church which has jurisdiction to hear and try charges of misconduct brought by a minister against a Bishop or a District Superintendent. Rev. Alberts never filed charges against Bishop Carroll or Rev. Barclay for having spoken with Dr. Devine, nor did he invoke the jurisdiction of the Church tribunal in any way.[2] Instead, he brought this civil action in the secular state courts in Massachusetts, alleging that his superiors induced Dr. Devine to breach his duty of confidentiality. One defense raised by Bishop Carroll and Rev. Barclay was that they were justified by Church law in doing what they did and that the First and Fourteenth Amendments of the United States Constitution precluded the state courts from adjudicating the content and applicability of Church law. This issue was brought before the trial court on motion for summary judgment (Appendix C), supported by an affidavit of Rev. Barclay (Appendix D) and an affidavit of another Methodist Bishop (Appendix E) who stated that Church law, as expressed in the Book of Discipline and understood and applied by Bishops and other clergymen in the Church, authorized the kind of inquiry made by Bishop Carroll and Rev. Barclay. The affidavit further stated that if Rev. Alberts felt he had been wronged thereby, he could have sought a Church trial. The affidavit also explained that the United Methodist Church is organized in hierarchical fashion. These assertions as to the content of Church law were uncontradicted in the record and the motion for summary judgment was allowed on constitutional grounds (Appendix F).

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[2]His failure to avail himself of the Church tribunal to bring charges *against Bishop Carroll and Rev. Barclay* should not be confused with a ruling by Bishop Carroll at the Annual Conference that charges *against Rev. Alberts,* consisting of eight reasons for the recommendation of retirement, were out of order.

The Petitioners also made a motion for a broad protective order against further inquiry either in pretrial discovery or at trial into the deliberations and decisions made by the Annual Conference or by any Boards or committees of the Church leading up to or constituting the recommendation and vote at the Annual Conference to place Rev. Alberts in the retired relation (Appendix G). Rev. Alberts had sued Dr. Devine as well as Rev. Barclay and Bishop Carroll and claimed as damages his loss of position in the Church. In order to establish a causal connection between that loss and a breach of duty by Dr. Devine or the clerical defendants, it would be necessary for the state courts to probe into the decision-making processes of the Church to determine what part, if any, information revealed by Dr. Devine played in shaping the decisions of the ministers involved in that process. The motion for protective order was allowed by the Superior Court (Appendix H, Item 71) to prevent such an inquiry which would have violated the separation of church and state required by the First and Fourteenth Amendments.

These rulings were reversed on review[3] by the Massachusetts Supreme Judicial Court, which held that:

(1) the case does not involve a dispute about religious faith or doctrine nor about church discipline or internal organization;

(2) even if the Constitution precludes inquiry into the content of Church law so that the court must assume Bishop Carroll and Rev. Barclay had the right under Church law to act as they did, the Constitution does not preclude imposition of liability; and

(3) the Constitution does not bar inquiry into the Church's proceedings culminating in Rev. Alberts' retirement.

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[3]The case went to the Supreme Judical Court on an appeal of the entry of Summary Judgment and on four reported questions which appear at 395 Mass. at 63. The Supreme Judicial Court answers the questions: (1) yes, (2) no answer necessary; (3) no; and (4) no. Only questions (3) and (4) are relevant to this Petition.

ARGUMENT

A. THE STATE COURT'S FORMULATION OF THE ELEMENTS OF AN ACTION FOR INDUCING BREACH OF CONFIDENTIALITY TO INCLUDE THE REASONABLENESS OF ONE'S BELIEFS, IF APPLIED TO THE CLERICAL DEFENDANTS, VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS

The Supreme Judicial Court took notice of the holdings of this Court "that the First Amendment prohibits civil courts from intervening in disputes concerning religious doctrine, discipline, faith, or internal organization. *Jones* v. *Wolf*, 443 U.S. 595, 602 (1979). *Serbian E. Orthodox Diocese for the U.S. & Can.* v. *Milivojevich*, 426 U.S. 696, 709, reh. denied, 429 U.S. 873 (1976). *Presbyterian Church in the U.S.* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969). *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 727 (1871)." 395 Mass. at 72 (Appendix B, page A.15). However, the Supreme Judicial Court failed to apply that rule properly to this case because it characterized the disputes in this case as not involving religious doctrine, discipline, faith or internal organization. 395 Mass. at 73 (Appendix B, page A.16). That characterization appears without analysis or explanation and is wrong.

The Supreme Judicial Court has now defined the elements of a cause of action for inducing breach of confidentiality under Massachusetts law:

> To establish liability the plaintiff must prove that: (1) the defendant knew or reasonably should have known of the existence of the physician-patient relationship; (2) the defendant intended to induce the physician to disclose information about the patient or

> the defendant reasonably should have anticipated that his actions would induce the physician to disclose such information; and (3) the defendant did not *reasonably believe* that the physician could disclose that information to the defendant without violating the duty of confidentiality that the physician owed the patient.

395 Mass. at 70-71 (emphasis added) (Appendix B, pages A.13-14). Under this formulation, as applied to the clerical defendants, the jury would be unable to determine what the beliefs of the defendants were or the reasonableness of those beliefs without evidence of the content of Church law and the interpretation of that law by Bishop Carroll and Reverend Barclay. The Petitioners would be required to prove they were, or believed that they were, in going to talk with Dr. Devine, performing administrative duties for the Church with respect to a minister under their charge and carrying out their sacred calling to minister to one toward whom they had or perceived a duty of pastoral care. Such beliefs would underlie a belief that, because of their relationship to Rev. Alberts in the Church and because of Rev. Alberts having subscribed voluntarily to the same system of Church organization and religious beliefs by becoming a minister of the Church, they could speak with Dr. Devine without subjecting him or themselves to civil legal liability. These issues clearly involve religious doctrine, discipline, faith and internal organization.

Finally the Petitioners would have to defend their beliefs as reasonable! It is difficult to conceive of a rule of law more offensive to the First Amendment. That ordained clergymen should have to defend the reasonableness of their beliefs in a secular court, before a jury of persons who do not share their religious views, is intolerable. Application of the rule to the Petitioners contravenes the First and

Fourteenth Amendments and the decisions of this Court cited above.

B. THE PETITIONERS' FIRST AMENDMENT RIGHTS OUTWEIGH THE INTEREST OF THE STATE IN PERMITTING REV. ALBERTS TO LITIGATE AND RECOVER DAMAGES AGAINST THE PETITIONERS

Having failed to perceive this case as one entailing impermissible adjudication of religious doctrine, faith and organization, the Supreme Judicial Court proceeded to apply a balancing test more appropriately applied to legislation which regulates or prohibits certain religiously motivated conduct. 395 Mass. at 73-74 (Appendix B, pages A.16-17). None of the decisions of this Court relied upon by the Supreme Judicial Court in applying a balancing test involved common law tort issues as between a minister and his superiors. None involved issues of ecclesiastical law as it affects the relationship between a minister and his superiors. None involved disputes which could and should only have been brought before a Church tribunal. None involved a searching inquiry into the decision-making processes of Church bodies regarding the status within the Church of one of its ministers. As will be discussed in this Petition at pages 12-20, *infra*, this case should be decided under the rule in *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976), reh. denied, 429 U.S. 873 (1976), and similar cases.

However, even if a balancing test should be applied to this case, the Supreme Judicial Court balanced the wrong interests, drew the wrong conclusions as regards the imposition of liability on the Petitioners and failed to conduct any balancing at all as regards an adjudication of damages flowing from Dr. Devine's alleged breach. With regard to the imposition of liability the Supreme Judicial

Court weighed the Church's "significant interest in assessing the qualifications of their ministers, and in appointing and retiring them" against a newly recognized "public policy strongly [favoring] judicial recognition of a physician's duty to honor the confidentiality of information gained through the physician-patient relationship." 395 Mass. at 74 (Appendix B, page A.17).

In focusing upon the public interest in recognizing the physician's duty, the Supreme Judicial Court balanced the wrong interest. Even if that interest is the appropriate interest to be balanced against the Petitioners' constitutional rights, the latter should be regarded as outweighing the former. Denying Rev. Alberts a recovery against Bishop Carroll and Rev. Barclay, when he is free to proceed against Dr. Devine, cannot possibly do harm to the public interest in recognizing the *physician's* duty.

The factor which should have been weighed against the Petitioners' religious freedom was the public interest, if any, in restraining the clerical defendants from *asking* Dr. Devine to violate his duty, if that is what they did. The Supreme Judicial Court assumed in this analysis that Church law did authorize the Petitioners to seek information from the psychiatrist. 395 Mass. at 74 (Appendix B, page A.17). Where Rev. Alberts had voluntarily united himself to the Church, he must be held to have done so with an implied consent to its government and was bound to submit to it. *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 728 (1872). Such implied consent necessarily extends to the Petitioners' inquiries of Dr. Devine, which were authorized under Church law. Surely the public interest in relieving Rev. Alberts of the consequences of his having consented to be governed by Church law in his relations with Bishop Carroll and Rev. Barclay does not outweigh their rights of freedom to engage in religiously motivated

conduct authorized under Church law. This was the balancing which should have been performed, if at all. Religious freedom is clearly the stronger value.

This conclusion is still more compelling when it is recognized that Dr. Devine was free at all times to decline to discuss Rev. Alberts with the Petitioners. Dr. Devine, not the Petitioners, is and ought to be the ultimate guardian of the confidentiality of information entrusted to him by his patient. With that factor added to the scales, the Petitioners' constitutional rights must prevail.

As regards the issue of damages flowing from a breach by Dr. Devine, the Supreme Judicial Court did not conduct any balancing of interests at all. It merely stated a conclusion that "the First Amendment does not bar judicial inquiry into the church's proceedings culminating in Alberts' failure to gain reappointment." 395 Mass. at 75 (Appendix B, page A.18). If some balancing of interests is appropriate, one would most likely balance a supposed public interest in seeing Rev. Alberts compensated for one particular item of claimed damages against the interests not only of Bishop Carroll and Rev. Barclay but of all members of the Southern New England Conference in conducting their deliberations as to the status and appointment of their ministers without fear of having them subjected to scrutiny by the secular courts. Here again, the religious freedoms protected by the First Amendment outweigh any interest the public might have in the amount of Rev. Alberts' recovery.

C. THE EXISTENCE OF A TRIBUNAL WITHIN THE CHURCH FOR THE ADJUDICATION OF DISPUTES AMONG CHURCH MEMBERS, AND REV. ALBERTS' FAILURE TO AVAIL HIMSELF OF THAT TRIBUNAL, REQUIRED SUMMARY JUDGMENT IN FAVOR OF THE PETITIONERS ON FIRST AMENDMENT GROUNDS

In numerous cases, both this Court and the Massachusetts Supreme Judicial Court have held that if a hierarchical religious organization establishes its own tribunals for resolving disputes among its members, the civil courts will defer to the religious tribunals and will not undertake to adjudicate those disputes. *Presbyterian Church in the U.S.* vs. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 443 (1969); *Wheeler* v. *Roman Catholic Archdiocese of Boston*, 378 Mass. 58, 389 N.E.2d 966 (1979). *See also Jones* v. *Wolf*, 443 U.S. 595 (1979); *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, reh. denied, 429 U.S. 873 (1976); *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679 (1872).

This rule should have been applied below in affirming the allowance by the Superior Court of the clerical defendants' Motion for Summary Judgment. In order to establish a claim for tortious inducement of breach of confidentiality, the plaintiff must show that Rev. Barclay and Bishop Carroll did not believe they had the authority or the duty to make an inquiry of Rev. Alberts' former psychiatrist regarding his mental and emotional needs. The existence or nonexistence of such authority and duty, and the reasonableness of the petitioners' beliefs therein, are rooted in the ecclesiastical law of the Church. As a "member in full connection" of the Church, Rev. Alberts had voluntarily submitted to Church law. The Book of Discipline provides:

> Members in full connection with an Annual Conference by virtue of their election and ordination are bound in special covenant with all the ordained ministers of the Annual Conference. In the keeping of this covenant they perform the ministerial duties and maintain the ministerial standards established by those in the covenant. They offer themselves without

> reserve to be appointed and to serve as their superiors in office may direct. They live with their fellow ministers in mutual trust and concern and seek with them the sanctification of the fellowship. Only those shall be elected to full membership who are of unquestionable moral character and genuine piety, sound in the fundamental doctrines of Christianity and faithful in the discharge of their duties.

(Appendix E, page A.52).

As in the *Presbyterian Church* and *Wheeler* cases, the Church is a hierarchical church which, by its own rules and regulations, has created tribunals for adjudicating disputes among its members. Affidavit of Joseph Yeakel, Paragraphs 4, 9 and 10 (Appendix E, pages A.27-28). If Rev. Alberts wished to assert that the Bishop and the District Superintendent were exceeding the scope of their authority in seeking information from Dr. Devine, he could have and should have raised charges against them within the ecclesiastical judicial system and sought a determination of that question by the body best situated, and indeed exclusively permitted, to interpret Church law. The effect of the Court's order and decision is to intrude into the intra-church relationship among ordained clergy and to proscribe consensual conduct which is based upon religious belief by burdening that conduct with the threat of civil liability.

As in the *Presbyterian Church* and *Wheeler* cases, the plaintiff failed to avail himself of the Church tribunal,[4] and resolution of this case cannot be achieved without reference to Church law. As in *Presbyterian Church* and

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[4]The ruling out of order a motion made during the Annual Conference to amend the recommendation of retirement of the plaintiff to an allegation of charges *against the plaintiff*, was merely a parliamentary ruling. (Appendix I, page A.92.) That ruling did not mean charges could not have been made at a different time and place *by* plaintiff *against his superiors*.

Wheeler, the Constitution of the United States required the allowance of the Petitioners' Summary Judgment Motion.

D. THE PLAINTIFF'S CLAIM OF DAMAGES IS A COLLATERAL ATTACK ON THE POLITY OF THE CHURCH, WHICH ATTACK IS PROHIBITED BY THE UNITED STATES CONSTITUTION

In its opinion below, the Supreme Judicial Court did not specifically enumerate damage as a requisite element in establishing the tort of inducing breach of confidentiality. However, in enunciating the existence of such a tort, the Supreme Judicial Court likened it to other intentional torts, 395 Mass. at 71 (Appendix B, at page A.14), of which damage is a required element. *Panko* v. *Consolidated Mutual Ins. Co.*, 423 F.2d 41, 44 n.4 (3d Cir. 1970) ("Whether plaintiff's cause of action is viewed as one for inducing breach of a contract with an implied term of secrecy or one for inducing or participating in a breach of fiduciary duty, plaintiff must show a causal connection between the allegedly tortious conduct and the injury complained of, even if the plaintiff establishes an intentional unprivileged interference."); *Botkin* v. *Miller*, 190 Mass. 411, 416, 77 N.E. 49 (1906) (in claim for interference with advantageous relations based upon a disturbance at plaintiff's barber shop by a group of Orthodox Jews in protest that the shop was being kept open on Saturday, "plaintiff did not go far enough to show that this disturbance was the cause of his loss of business. . . ."); *Chemawa County Golf* v. *Wnuk*, 9 Mass. App. Ct. 506, 510, 402 N.E.2d 1069 (1980) ("It is also of the essence in an action for wrongful interference with contractual relationships that the plaintiff suffer damages as a consequence of the defendant's conduct, and those damages cannot be conjectural

or speculative losses:"). In apparent recognition of his obligation to establish actual causation of damages, Rev. Alberts in this case has alleged, in Paragraph 7 of the Complaint, "as a result of the disclosure alleged in Paragraph 6, and using the information communicated thereby as a public justification, Bishop Carroll caused the Plaintiff not to be reappointed as Minister of Old West Church. . . ." (Appendix J, page A.94). He goes on to allege loss of benefits and salary by reason of "the termination of his career as a Methodist Minister." (Appendix J, pages A.94 and 95). In paragraph 6(b), he alleges that Petitioners Carroll and Barclay communicated their opinions of the Plaintiff's mental health to "numerous individual members of the Southern New England Conference as well as the various boards, committees and subcommittees of the Conference concerned with the appointment of its ministers to local churches. . . ." (Appendix J, page A.97).

For the same reason the state courts are prohibited from inquiring into the question of whether Bishop Carroll and Rev. Barclay were justified or reasonably believed they were justified in talking to Dr. Devine, the United States Constitution prohibits the courts from inquiring into the criteria applied by the individual members, boards, committees and subcommittees of the Southern New England Conference in their recommendations and decisions to place Rev. Alberts in retirement.

It is an undisputed fact that Rev. Alberts was retired by vote of the Southern New England Conference of the Church, upon recommendation of the Board of Ministry, on or about June 7, 1973. Affidavit of John Barclay, Paragraphs 6 and 7. (Appendix D, pages A.23-24). That action was prescribed by the Book of Discipline, Paragraph 360, referred to in Reverend Barclay's Affidavit. (Appendix D, page A.24). In conducting the meetings and delibera-

tions and in finally voting retirement, the members of the United Methodist church were exercising their constitutional rights to select the clergy of their church. The Conference, not the Bishop, was that body within the Church charged with making such decisions concerning the selection of its clergy.

Inquiry into those deliberations and decisions is expressly prohibited by the doctrine established by this Court in *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, reh. denied, 429 U.S. 873 (1976). In that case, the plaintiff was a bishop of the defendant church who had been suspended, removed and ultimately defrocked by the church. He sought in a civil action to challenge that decision:

> Nor is there any dispute that questions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern; . . .
>
> Yet having recognized that the Serbian Orthodox Church is hierarchical and that the decisions to suspend and defrock respondent Dionisije were made by the religious bodies in whose sole discretion the authority to make those ecclesiastical decisions was vested, the Supreme Court of Illinois nevertheless invalidated the decision to defrock Dionisije on the ground that it was "arbitrary" because a "detailed review of the evidence discloses that the proceedings resulting in Bishop Dionisije's removal and defrockment were not in accordance with the prescribed procedure of the Constitution and the penal code of the Serbian Orthodox Church." [citation omitted] Not only was this "detailed review" impermissible under the First and Fourteenth Amendments, but in reaching this conclusion, the court evaluated conflicting testimony concerning internal church procedures and rejected the

> interpretations of relevant procedural provisions by the Mother Church's highest tribunals.

426 U.S. at 717-18.

As was clear in the instant case from the allegations of the Complaint and the course of discovery up until the hearing on Defendants' Motion for Summary Judgment, Rev. Alberts intended to have the state court conduct a "detailed review" of the proceedings resulting in his retirement. (*See* page 19, *infra*.) Without such evidence, he could not establish the necessary causal relation between the alleged breach of confidence and damages flowing from his retirement. Yet such inquiry is prohibited.

Because the undisputed facts below supported invocation of the First and Fourteenth Amendments by Petitioners Barclay and Carroll, the Superior Court below properly allowed their Motion for Summary Judgment. The Supreme Judicial Court should have answered the third reported question "yes" and affirmed entry of summary judgment.

E. THE SUPERIOR COURT BELOW PROPERLY INVOKED THE FIRST AMENDMENT IN ENTERING THE PROTECTIVE ORDER QUASHING SUBPOENAS AND BARRING FURTHER DISSEMINATION OR USE OF CHURCH-RELATED MATERIALS BROUGHT OUT DURING DISCOVERY IN THIS CASE

Petitioners Carroll and Barclay sought and obtained a broad protective order in conjunction with their Motion for Summary Judgment "...protecting them from infringement upon their First Amendment rights as members of the United Methodist Church, and particularly in their roles as Bishop and District Superintendent respectively," and precluding Rev. Alberts' use of church-related

documents and testimony in any further proceedings against Dr. Devine. (Appendix G, pages A.83-84). In support of that Motion, Bishop Carroll and Rev. Barclay relied on their argument that the Constitution prohibited inquiry by civil courts into matters of church doctrine and administration, and that further exposure of church matters to such scrutiny in this case would interfere with their free exercise of religion. The Motion was allowed without written memorandum (Appendix H, page A.89, item 71), except for the following reference in the lower Court's Memorandum on Status of the Parties and Causes of Action for Report. (Appendix K, page A.103). There the Superior Court wrote:

> Although the case against defendant Devine remains facially viable, any further discovery or testimony by the defendants Barclay and Carroll would result in their invocation of the privileges and immunities heretofore discussed.

The Supreme Judicial Court held, however, that the First Amendment was not thus properly invoked.

The clerical defendants' rights under the Constitution protect them from unwarranted intrusion into their religious beliefs and practices, whether the intrusion threatens them as defendants or merely as witnesses. What is more, the issues of justification and causation of damages, to which the church-related evidence would be relevant in a claim against the clerical defendants, are identical to the issues of justification and causation of damages in the Plaintiff's claim against Dr. Devine. In both contexts, the state court would be compelled to determine the applicability and interpretation of ecclesiastic law to resolve the justification issue. Similarly, no matter who the defendant, Rev. Alberts cannot establish a causal connection between Dr. Devine's conversation with the clergymen

and his involuntary retirement without asking the state court to scrutinize the Church's decision-making process. The state court would have to determine what role or weight, if any, the disclosures had in that decision as compared with other factors which may have been brought to the attention of those making the decision, such as the marriage of two homosexuals conducted by Rev. Alberts two months before his involuntary retirement (Appendix L, page A.104), his self-avowed initiation of or participation in "a number of projects that were controversial... [including] getting arrested at an anti-war sit-in..." (Appendix L, page A.104, ¶3), fall-out from his marital problems (see Appendix L, page A.105, ¶13) or any other aspects of his own conduct, including the fact that he was tired and worn out (see Appendix L, page A.110, lines 18-22), which led him to request a leave of absence in January, 1973, six months before his retirement (Appendix L, page A.110, lines 16-24) and which led Bishop Carroll to conclude *before ever talking to Dr. Devine* that he "felt Bill [Alberts] was too sick to function in the ministry." (Appendix L, page A.112, lines 3-13).

The decision to place Rev. Alberts in the retired relation within the Church was made by vote of literally hundreds of clergymen at the Annual Conference of the Southern New England Conference of the Church. (Appendix I, pages A.91-92). The vote followed lengthy statements by many individuals, including a presentation by Rev. Alberts himself, for whom a special extension of time was approved. (Appendix I, page A.91). Nowhere in the record is it indicated that the Petitioners repeated at the Conference any disclosure made to them by Dr. Devine. It is utter speculation that all or even a majority of those voting on Rev. Alberts' retirement had heard any reference to disclosures by his former psychiatrist. Moreover, even if

the voting clergymen knew, how can the weight each of them gave to that information or any other facts or conduct before them, be assayed without having their innermost thoughts, including their standards for ministers within their church, laid bare to the triers of fact in the civil court? The Constitution forbids precisely such an intrusion into "questions of church discipline and the composition of the church hierarchy [which] are at the core of ecclesiastical concern." *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 717, reh. denied, 429 U.S. 873 (1976).

Causation of damages, justification and the Petitioners' beliefs as to their authority are the only issues to which the church-related evidence is conceivably relevant. The state court is precluded from adjudicating these issues. Thus the evidence at issue is not relevant to any issue which can properly be adjudicated. The Superior Court properly entered the protective order and the fourth reported question should be answered "yes."

CONCLUSION

For all of the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

Bishop Edward G. Carroll
Rev. John E. Barclay

By Their Attorneys,

PAUL R. DEVIN

DEBORAH S. GRIFFIN
RIPLEY E. HASTINGS
PEABODY & ARNOLD
ONE BEACON STREET
BOSTON, MASSACHUSETTS 02108
(617) 523-2100

Rev. John E. Barclay

By His Attorney,

FLORENCE E. FREEMAN
FREEMAN & WHITE
ONE BOSTON POST ROAD
WESTON, MASSACHUSETTS 02193
(617) 893-1510